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ONE HUNDRED NINTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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May 19, 2005

The Honorable Alberto Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Gonzales:

As you are aware, the Committee on the Judiciary has been holding a series of oversight hearings to examine the use by the Department of Justice of the law enforcement authorities granted by the USA PATRIOT Act. Several Members have requested that the Department respond to additional written questions. I am transmitting these questions for your response on behalf of Ranking Minority Member Conyers, and Representatives Lofgren and Meehan.

Thank you for your attention to these questions.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

FJS/mb

Representative Conyers

1. On numerous occasions in the past, I and other Democratic members have submitted questions to the Department concerning the USA PATRIOT Act and other terror-related issues. Attached are a number of such letters that have been ignored. Could you please appraise us whether a response is pending, and if not, why not. As a general matter, please explain the rule or standard for responding to Minority initiated questions.

2. At the hearing, you expressed a willingness to open up the files on the Brandon Mayfield investigation, subject to a purported limitation imposed by the ongoing litigation of the matter. You stated,

“Again, Congressman, this matter is in litigation so I’m likely to be limited about what information I can share with you, but I’m happy to go back and see what we can do to provide information to the committee in connection with this case.” See Transcript, “Oversight Hearing on the USA Patriot Act: A Review for the Purpose of Reauthorization,” at 27:557-561 (April 6, 2005).

We reviewed numerous precedents and found that the presence of ongoing litigation is not a barrier to the broad and encompassing power in Congress to obtain information. This power reaches all sources of information in open and closed cases, subject only to narrow privilege exceptions. See *Sinclair v. United States*, 279 U.S. 263 (1929) (rejecting in unequivocal terms the witness’ contention that the pendency of lawsuits provided an excuse for withholding information); see also *McGrain v. Daugherty*, 272 U.S. 135 (1927); *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491 (1975); *Watkins v. United States*, 354 U.S. 178 (1957). In light of these precedents, we reiterate our request for all records in the Brandon Mayfield investigation relating to the following:

- A. Any Foreign Intelligence Surveillance Act (“FISA”) orders issued in the investigation, approving the physical search or electronic surveillance conducted on Mr. Mayfield, his office, his home or any other property;
- B. Any Prosecutorial memoranda detailing deliberations on the investigation;
- C. All audiotape recordings, telephone wiretaps, telephone records the FBI obtained from Mr. Mayfield’s home or office, other audio interceptions or transcripts;
- D. Any documents seized in evidence.

If you are asserting privilege with regard to any of this information, please substantiate the privilege.

3. Please articulate the standard you suggest this Committee use when deciding whether to reauthorize particular sections of the PATRIOT Act? It appears from numerous public statements that your department sees the infrequent use of a provision as good restraint, and the exorbitant use of other provisions as a sign of their usefulness.

4. You confirmed that your department has used Section 215 of the PATRIOT Act 35 times.

What type(s) of information was sought? What type of entity was the recipient of the request?

5. In how many investigations has information obtained from FISA orders been used for investigations of "federal crimes of terrorism," as that term is defined in 18 U.S.C. § 2332b(g)(5)? What federal crimes of terrorism were being investigated?
6. In how many investigations has information obtained from FISA orders been used for investigations of criminal offenses other than "federal crimes of terrorism," as that term is defined in 18 U.S.C. § 2332b(g)(5)? What such offenses were being investigated?
7. Pursuant to section 223 of the PATRIOT Act (civil liability), have any claims been filed against the United States or has any official of the Department of Justice been sued or disciplined? What was the nature and outcome of such claim(s)?
8. How many single-jurisdiction search warrants have been issued pursuant to Rule 41(a)(3) of the Federal Rules of Criminal Procedure as amended by section 219 of the PATRIOT Act?
9. How many times has the Department of Justice disclosed grand jury information pursuant to its power under section 203 of the PATRIOT Act? Has this section every been used to obtain, and then disclose, entire databases of data to the government? If so, what types of databases were obtained and to whom were they given?
10. You have confirmed that the Department has attained 155 "sneak and peek" searches under Section 213 of the PATRIOT Act. How many of those 155 cases were terror related? How many prosecutions have resulted, at least in part, from sneak and peek searches? And how many of those prosecutions were terror related?
11. How many emergency FISA orders has the Attorney General authorized since September 11, 2001?
12. Has the DOJ offered any classified evidence in immigration proceedings that have been instituted since March 1, 2003?
13. How many protective orders have been requested under 8 C.F.R. § 1003.46? How many of those were granted?
14. You confirmed that you had received information from libraries, but not through Section 215. Please provide unclassified information on the number of times Section 505 of the USA PATRIOT Act have been used in libraries. What other authorities have been used to request or accept information from libraries in terror-related cases?
15. For the past 20 years, the government has issued the total number of FISA applications, the number granted and the number denied without harm to our national security. Why then won't the Justice Department issue an unclassified number of orders under Section 215 of the Patriot Act, which should have fewer national security implications? Aren't there other FISA

numbers that could be released to the public without harming national security? What about the number of Section 215 orders, and the number of National Security Letters?

16. The government often seems to blur the distinction between criminal investigations, which carry certain protections, and national security investigations, which are broader and more secretive. For example, with regard to Section 215 of the Patriot Act, the Justice Department claims that it just wanted to give prosecutors the same tools for going after terrorists that they have for going after other criminals (such as the Mafia, or ordinary street crime). If supporters of the Patriot Act are going to argue that changes to the law are needed to give the government the same powers in foreign intelligence investigations that it already had in criminal investigations shouldn't the same safeguards apply as well?

17. The SAFE Act changes Section 213 (which authorizes delaying notice of search warrants in certain cases) to state that instead of an open-ended delay, the Justice Department can receive an initial 7-day delay before notifying someone of a search warrant, in certain circumstances. DOJ has challenged this as an unreasonable requirement. But, isn't it the case that 7-days was the general length of delay authorized by courts before the Patriot Act?

18. Section 206 of the Patriot Act creates "roving wiretaps" in intelligence cases (i.e., outside of the normal Title 3 criminal wiretaps), which allows the government to get a single order that follows the target from phone to phone. In addition, the Intelligence Authorization bill passed shortly after the Patriot Act allows the government to issue "John Doe" wiretaps, where the phone or facility is known, but the target is not known. The way that the two laws were written seems to allow for a general wiretap - one that follows an unknown suspect from unknown phone to unknown phone. Your Department claims that this authority is available in standard criminal cases. Please list the jurisdictions that allow you to install a wiretap after neither designating the target nor a specific phone.

19. Section 218 has been described as tearing down the "wall" between intelligence and criminal investigations, and the Department has been adamant that it should not sunset. However, the PATRIOT Act has already created permanent authorization for information sharing between the criminal and intelligence agencies: Section 905 requires the Attorney General to provide terror related information to the Director of National intelligence that is uncovered in the process of a criminal investigation, and section 504 allows FISA information to be given to the criminal division. Don't these two sections ensure that real terror and intelligence information can be shared? Doesn't Section 218 only facilitate criminal prosecution against those who are not guilty of terror-related offenses?

20. Does any department or agency of the U.S. government have the legal authority to transport U.S. citizens or non-citizens to foreign governments that practice torture or other inhumane treatment? Please provide an unclassified and classified copy of any document(s) pertaining to such authority.

21. Does any department or agency of the U.S. government have the legal authority to transport foreign nationals to foreign governments for the purpose of obtaining information?

Please provide an unclassified and classified copy of any document(s) pertaining to such authority.

22. Has the Justice Department prosecuted American personnel who transported U.S. citizens or non-citizens to foreign governments that practice torture or other inhumane treatment? If not, why?

23. (a) What categories of persons currently in U.S. military custody are excluded from the protections of the U.N. Convention Against Torture?

(b) What categories of persons currently in U.S. military custody are excluded from the protections of the Geneva Conventions?

24. How many individuals has the Department detained in the war on terror? Of those how many are known to have a connection to the 9/11 attacks or Al Qaeda? How many have no known connection to the 9/11 attacks or Al Qaeda? Please list the authorities for detaining both groups.

25. Will you support the extension of the assault weapons ban so that terrorists in the United States cannot obtain such harmful weapons and cause mass casualties on American city streets?

26. Considering how the FBI mishandled the Madrid bombing investigation and detained an innocent person, has the Department reviewed the alleged evidence against other detainees and material witnesses to see if that evidence was valid? If not, why not?

27. Assume that a stored recording of a telephone conversation is made by a network administrator without notice to the two parties. Do the two parties to the telephone conversation retain the same "reasonable expectation of privacy" in the stored conversation that they would have if the conversation was not stored? If so, would the Fourth Amendment protections be lower in any respect than those set forth in *Berger v. New York*?

28. Does your answer to Question 27 differ if the network administrator has provided general notice, such as through the terms of use, that caching and other storage of telephone conversations may occur for network security and other reasons?

29. Assume that one party to a telephone conversation, which is conducted by VoIP on a computer, keeps a stored record of the conversation on that computer. Assume that the other party does not know the conversation is being recorded. Does either party to the conversation have a "reasonable expectation of privacy" in the contents of that conversation, so that Fourth Amendment protections apply?

30. Does your answer to Question 29 differ if both parties know the conversation is being recorded? Has the party who is not doing the recording thereby consented to waiving Fourth Amendment protections?

31. Does Section 209 as it currently exists allow law enforcement seizure of stored wire communications other than voice mails?
32. Does Section 209 as it currently exists apply to the fact setting of Question 27?
33. Does Section 209 as it currently exists apply to the fact setting of Question 28?
34. Does Section 209 as it currently exists apply to the fact setting of Question 29?
35. Does Section 209 as it currently exists apply to the fact setting of Question 30?
36. Assume that VoIP telephone transmissions are done through a "store and forward" system in which there is transient storage of phone conversations as packets move from one part of the Internet to the next. Would this form of storage be enough to permit seizure of the stored recordings of telephone conversations under Section 209? Would it be enough under the panel decision in *U.S. v. Councilman*? Would it be enough under the Department of Justice position as set forth in the briefs in *U.S. v. Councilman* for the en banc First Circuit?
37. Under Section 209 as it currently exists, are there any circumstances in which law enforcement can seize stored voice mail or a stored telephone conversation recording by use of a 2703(d) order or any other procedure that is less strict than a search warrant issued by a neutral magistrate?
38. Please provide the Committee with information on the extent to which the new authority in Section 209 has been used in anti-terrorism cases. Has the new authority been used in any anti-terrorism investigations or prosecutions? Approximately what proportion of uses of the new authority has been for use in anti-terrorism cases?

Representative Lofgren

1. How many FISA searches have been conducted under the standard set out in section 218 of the PATRIOT Act? How many prosecutions for terrorism-related crimes have been initiated as a result of such a search? How many prosecutions for non-terrorism related crimes have been initiated as a result of such a search? How many convictions have been obtained?
2. Since 9/11, how many times has the Department used its authority to detain material witnesses under 18 U.S.C. section 3144? How many of these individuals actually ended up testifying before a grand jury?

Representative Meehan

Before we grant new powers to combat terrorism, we should make certain that the Justice Department is using the authority it already has to keep dangerous weapons out of the hands of terrorists.

The Justice Department's Inspector General recently issued a report detailing "critical deficiencies" in how the Bureau of Alcohol, Tobacco, Firearms, and Explosives is carrying out the Safe Explosives Act, which Congress passed shortly after 9/11. According to the report, 38,000 individuals had applied for a permit to use explosives. But the ATF failed to request an FBI background report on 9 percent of them - about 3,400 people.

Even when a background check was requested, the ATF failed to complete the clearance process 31 percent of the time. As a result, thousands of people remained in a "pending" status that allowed them to continue to use explosives for an average of 299 days.

Perhaps most troubling, in more than half of the cases (655 of 1,157) where the FBI background check had discovered criminal records or other red flags, the ATF failed to take action. The IG found one person who had four felony convictions who was allowed access to explosives.

1. Attorney General Gonzales, have you reviewed the Inspector General's report? And if so, are you disturbed by what it found?
2. What are your plans to improve enforcement of the Safe Explosives Act?

Last month, a GAO report found that 53 individuals on the FBI's terrorism watch list were allowed to purchase guns. These are people the government is tracking because they are suspected terrorists, and yet we're allowing them to buy guns right under our noses. Director Mueller testified before the House Appropriations Committee and he said that "We ought to look what can be done to perhaps modify the law to limit [suspected terrorists] access to a weapon."

3. Would you support legislation prohibiting individuals on the FBI's "Violent Gang and Terrorist Organization File" from obtaining weapons?
4. Please explain and provide the criteria used for determining when an individual will be added to the Violent Gang and Terrorist Organization File. What percentage of individuals included in the file have been added to the list as a result of an arrest, conviction or personal acknowledgment of involvement in gang or terrorist-related activity? Is there a process for an individual to have his or her name removed from the file? If so, please explain.

Attorney General Gonzales, in your Senate testimony you said that the Administration's policy is that "we don't engage in torture, we don't condone torture, and we're not going to render people to countries where we think it's more likely than not that they're going to be tortured."

That standard seems to be lower than the International Convention Against Torture, which prohibits the rendition of an individual "where there are substantial grounds for believing that he would be in danger of being subjected to torture."

5. Is the Administration's policy not to render prisoners only if it is "more likely than not" they will be tortured? And if so, what is the standard for determining whether it's more likely than not that a person will be tortured? For example, what if it is determined that there is a 49% chance that they will be tortured? Or is the Administration adhering to the "substantial grounds" standard of the Geneva Convention?